

The judicial and legal framework of culture. Cultural Rights

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In an attempt to rectify the dispersion of the cultural rights presented in the various international instruments that recognise them and to make progress in an audacious formulation thereof, the Fribourg Group has been meticulously working for over a decade on outlining, updating and systemising said rights. The group is formed of a multinational team of researchers, organised around the Interdisciplinary Institute for Ethics and Human Rights of the University of Fribourg, under the mandate of UNESCO. It is charged with drawing up a declaration of cultural rights and its works have included the development of a definitive definition of said rights. The purpose of this is to facilitate the inclusion of those rights –with the greatest technical rigour– in international legal protection instruments and therefore, in accordance with the respective constitutional provisions, in the internal statutes of the States who undersign them.

Before addressing the possibility of their affirmation as authentic subjective rights and as fundamental human rights, let us start by learning about the set of rights which, according to the Fribourg Declaration on Cultural Rights, of the 7th of May 2007, form the category of cultural rights. In said document, written by the group, the rights are systemised as follows:

Identity and Cultural Heritage

Everyone, alone or in community with others, has the right:

a. To choose and to have one's cultural identity respected, in the variety of its different means of expression. This right is exercised in the inter-connection with, in particular, the freedoms of thought, conscience, religion, opinion and expression;

b. To know and to have one's own culture respected as well as those cultures that, in their diversity, make up the common heritage of humanity. This implies in particular the right to knowledge about human rights and fundamental freedoms, as these are values essential to this heritage;

c. To access, notably through the enjoyment of the rights to education and information, cultural heritages that constitute the expression of different cultures as well as resources for both present and future generations.

Cultural communities

a. Everyone is free to choose to identify or not to identify with one or several cultural communities, regardless of frontiers, and to modify such a choice;

b. No one shall have a cultural identity imposed or be assimilated into a cultural community against one's will.

Access to and participation in cultural life

a. Everyone, alone or in community with others, has the right to access and participate freely in cultural life through the activities of one's choice, regardless of frontiers.

b. This right includes in particular:

The freedom to express oneself, in public or in private in the language(s) of one's choice;

The freedom to exercise, in conformity with the rights recognised in the present Declaration, one's own cultural practices and to follow a way of life associated with the promotion of one's cultural resources, notably in the area of the use of and in the production of goods and services;

The freedom to develop and share knowledge and cultural expressions, to conduct research and to participate in different forms of creation as well as to benefit from these;

The right to the protection of the moral and material interests linked to the works that result from one's cultural activity.

Education and training

Within the general framework of the right to education, everyone has the right throughout one's lifespan, alone or in community with others, to education and training that, responding to fundamental educational needs, contribute to the free and full development of one's cultural identity while respecting the rights of others and cultural diversity. This right includes in particular:

a. Human rights education and knowledge;

b. The freedom to teach and to receive teaching of and in one's language and in other languages, as well as knowledge related to one's own culture and other cultures;

c. The freedom of parents to ensure the religious and moral education of their children in conformity with their own convictions while respecting the freedom of thought, conscience and religion of the child on the basis of her/his capacities;

d. The freedom to establish, to direct and to have access to educational institutions other than those run by the public authorities, on the condition that the internationally-recognised norms and principles in the area of education are respected and that these institutions conform to the minimum rules prescribed by the State.

Communication and information

Within the general framework of the rights to freedom of expression, including artistic freedom, as well as freedom of opinion and information, and with respect for cultural diversity,

everyone, alone or in community with others, has the right to free and pluralistic information that contributes to the full development of one's cultural identity. This right, which may be exercised regardless of frontiers, comprises in particular:

a. The freedom to seek, receive and impart information;

b. The right to participate in pluralist information, in the language(s) of one's choice, to contribute to its production or its dissemination by way of all information and communication technologies;

c. The right to respond to erroneous information concerning cultures, with full respect of the rights expressed in this Declaration.

Cultural cooperation

Everyone, alone or in community with others, has the right to participate, according to democratic procedures:

In the cultural development of the communities of which one is a member;

In the elaboration, implementation and evaluation of decisions that concern oneself and which have an impact on the exercise of one's cultural rights;

In the development of cultural cooperation at different levels.

The Fribourg Declaration brings together and clarifies rights that have already been recognised, albeit diffusely, in numerous international instruments and, as it justifies in its own text, it responds to the need "to show the crucial importance of these cultural rights as well as the cultural dimension of other human rights".

Indeed, the rights outlined, systemised and updated therein are already recognised, on the one hand, in the International Covenant on Civil and Political Rights and, on the other, in the International Covenant on Economic, Social and Cultural Rights, both adopted by the General Assembly of the United Nations in Resolution 2200 A (XXI) of the 16th of December 1966. In turn, these have roots in the process which lead to the United Nations' plenary approval of the Universal Declaration of Human Rights on the 10th of December 1948.

Up until the final writing of said Declaration, the Fribourg Group continued to classify the cultural rights recognised in the various existing international instruments as follows: rights recognised as cultural rights; the recognised rights of those dedicated to the field of culture; and the cultural dimension of civil and political rights.

The rights recognised as cultural rights by international instruments include the following: the right to participate in the cultural life of the community and the protection of intellectual property of creations and copyrights (recognised in Article 27 of the Universal Declaration of Human Rights and Article 15 of the International Covenant on Economic, Social and Cultural Rights); the right to education (Article 26 of the UDHR and Articles 13 and 14 of the ICESCR); and the linguistic freedoms recognised for those belonging to a minority (Article 27 of the International Covenant on Civil and Political Rights).

The rights recognised for professionals of culture include academic freedoms, the rights of teachers and journalists (said rights cannot be denied their definition as human rights because they lack the necessary characteristic of being universal, given that they allow and necessitate an interpretation using universal logic, seeing as anyone can be

an author, teacher or journalist and must therefore have said rights).

The cultural dimension of civil rights obligates the outlining of, among others, the right to dignity and non-discrimination (right to the respect of cultural identities); the freedoms of thought, conscience and religion; the freedoms of opinion, expression (right to information) and association (the right to belong or not to a cultural community).

Similarly, the table of cultural rights produced by the Fribourg Group was based on the international agreements which covered said rights, either through their express formulation or in a more fragmented way. It began with the delimitation of nine rights or groups of rights which, depending on the fields to which they referred, could be grouped around three poles: creation, communication and identity. The political dimension had to be added to each one.



Therefore, in terms of creativity and creation, they included the freedoms of investigation, creation and copyrights, as well as linguistic freedoms. The legal support for these included Articles 27 of the UDHR, Article 15 of the ICESCR, the United Nations Declaration on Minorities and numerous sectoral instruments.

In terms of expression and communication, included were the right to an education and permanent training, the right to adequate information and the right to participate in cultural heritage. Their legal support was found in Article 26 of the UDHR, Articles 13 and 14 of the ICESCR and 19 of the UDHR, and Articles 19 and 27 of the ICCPR.

As regards identity, included was the right to freely choose and have one's cultural identity respected in the variety of its different means of expression; the right to know about and have one's own culture respected in its diversity; and the freedom to identify or not identify with a cultural community. The legal framework of these rights is fragmented due to their recognition within civil rights (ICCPR - Articles 17, 18, 22 and 27) and in the UN Declaration on Minorities, vis-à-vis the right to non-discrimination and freedom of association.

Lastly, there was a need to include the right to participate in cultural policies in all fields specific to the previously listed rights (Articles 21 to 27 of the UDHR, Articles 25 to 27 of the ICCPR, the ICESCR and the United Nations' Declaration on Minorities).

In Europe, a highly relevant legal text is the Charter of Fundamental Rights of the European Union, which is the result of the work carried out in the European Convention between the 26th of February 2002 and the 8th of July 2003. It refers to rights as deep-rooted as those linked to the arts, whether these are rights or freedoms; to scientific research (II-13); freedom of thought, conscience and religion (Article II-10), the right to education (II-14); human dignity (I-1); and freedom of expression (II-11), etc.

On another level, the Charter obliges the Union to protect cultural, religious and linguistic diversity (III-22), a new aspect that should be especially highlighted due to its connection with cultural rights.

If the Union undertakes to protect cultural diversity, this provision must be understood, pursuant to the relevant international texts, particularly UNESCO's Universal Declaration on Cultural Diversity and Convention on the Protection and Promotion of the Diversity of Cultural Expressions, as an acceptance of the obligation to protect cultural rights within the European Community, with human rights being the guarantors of cultural diversity.

With the protection of cultural diversity we are protecting cultural rights, imposing a cultural based reading of the entire set of public rights and freedoms recognised on a European level¹.

Lastly, we must cite another very valuable instrument for the recognition of economic, social and cultural rights which is associated with the Organisation of American States (OAS): the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, known as the Protocol of San Salvador, which was approved by the General Assembly of the OAS in November 1988. Said protocol fully recognises the right to education (Article 13) and the right to the benefits of culture (Article 14).

Of crucial importance on the African continent is the African Charter on Human and Peoples' Rights. This was adopted on the 27th of July 1981, during the 18th Assembly of Heads of State and Government of the Organisation of Africa Unity which met in Nairobi, Kenya and it has been in force since October 1986. Article 17 thereof recognises the right of every individual to education, the right to freely take part in the cultural life of one's community and that the promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.

Additionally, Article 22 establishes: "1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind. 2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development."

Articles 25 and 26 respectively state that: "State Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood" and that said states shall have the duty "to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter".

Collective and identifying rights

The preamble of the Fribourg Declaration reads as follows: "Observing that cultural rights have been asserted primarily in the context of the rights of minorities and

indigenous peoples and that it is essential to guarantee these rights in a universal manner, notably for the most destitute.”

Since 1969, the UN’s Declaration on the Elimination of All Forms of Racial Discrimination has promoted universal and effective respect for human rights and fundamental liberties, condemning the practices of segregation and discrimination.

The International Labour Organisation’s Convention 169² (approved by Law 24.071 of 1992) sustains that “in many parts of the world these peoples are unable to enjoy their fundamental human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded.” It also reminds us of “the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding.” It affirms the States’ obligations to recognise and protect the social, cultural, religious and spiritual values and practices of said people; to respect the integrity of their values, practices and institutions; to promote their participation in decisions about their priorities; to protect the environment of the territories in which they live; and to take into consideration their common law when applying legislation. Said 1989 Convention concerning Indigenous and Tribal Peoples in Independent Countries, in terms of the possession of the lands traditionally inhabited by said communities, establishes a concept of territory “which covers the total environment of the areas which the peoples concerned occupy or otherwise use” and obligates the protection of the natural resources that exist therein. The convention covers, among other things, matters of great interest related to cooperation across frontiers, thus recognising the situation of numerous peoples settled in territories that extend across national borders. This includes Andean peoples such as the Aymara people living in Peru, Bolivia and Chile and the Quechua who populate Colombia, Ecuador, Peru, Bolivia, Argentina and Brazil.

In its General Conference in October 2005, UNESCO presented for approval the Convention for the Protection and Promotion of the Diversity of Cultural Expressions, an international, legally binding agreement which guarantees that artists, professionals and other stakeholders of culture, along with citizens all over the world, can create, produce, publish and enjoy a wide range of cultural goods, services and activities, including their own. It was adopted because the international community understood the urgency of the need to apply international regulations which would

recognise, on the one hand, the distinctive character of cultural goods, services and activities as vectors for the transmission of identity, values and meanings; and on the other hand, that these cultural goods, services and activities are not merely merchandise or consumer goods that can only be considered as objects of commerce, even if they do have a significant economic value

The Convention rests on the assumption that cultural diversity is an item of world heritage that must be treasured and preserved because it increases human possibilities, capacities and values, within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures. It highlights the importance of the knowledge systems of native peoples and their contribution to sustainable development, as well as the need to guarantee their protection and promotion. It affirms that cultural activities, goods and services must not be only considered for their commercial value but that they have value of a cultural nature. It is therefore differentiated from the position of the United States, Australian and Japanese governments who believed it took a protectionist position and who were, until very recently, in favour of the absolute application of free exchange (Mattelart, A. 2005) as regards all products and services.

According to the United Nations’ Declaration on the Rights of Indigenous Peoples of the 13th of September 2007, the right to cultural identity and integrity is inherent in the right of indigenous people to determine and protect the system of culture and values by which they want to live, not suffering forced assimilation or the destruction of said culture.

In this respect, the right to cultural identity entails the effective and real possibility of indigenous peoples remaining and perpetuating as distinct peoples. The right to cultural identity and integrity supposes the protection of their customs and traditions, their institutions and common laws, the ways in which they use their land, their forms of social organisation, and their social and cultural identity. States must recognise and respect cultural identity and they must consult indigenous peoples before adopting measures or projects that may affect them.

The nature, scope and entitlement of these rights are, however, controversial.

When the crisis situation of a current state is undeniable – it being subject to cultural, economic, financial, migratory and other types of tensions and with globalisation revealing its fragility and insufficiency as a political body that

should be capable of responding to emerging needs of any sort – the affirmation of the existence of collective rights and traits and the scope that these are attributed will depend on the legal response that is given to the complex situations which cultural pluralism generates.

In short, beyond the postulates defended under one stance or another, the debate underlying this controversy is whether all cultures are of equal value and whether states (and the politico-administrative units into which they are organised) have the capacity to organise themselves so as to integrate the various cultures that may reside in their territory and to give satisfactory responses to the legitimate aspirations of their respective members and citizens.

As Pérez de la Fuente³ cited from Parekh's work *Political Theory and the Multicultural Society*: "Contemporary multicultural societies have emerged against the background of nearly three centuries of the culturally homogenizing nation-state. As a territorially constituted entity, the modern state accommodated territorial but not cultural decentralization. Since the state required cultural and social homogenization as its necessary basis, it has for nearly three centuries sought to mould the wider society in that direction. Thanks to this, we have become accustomed to equating unity with homogeneity, and equality with uniformity."

The same author, in his work *Cultural Pluralism and the Rights of Minorities* explains how "the consensus on cultural values which nations suppose is a pre-political link of the State which assumes the homogeneity which drowns difference" is now on another level and contrasts "the egalitarian liberal position" with multiculturalism. Thus, this "affirms a consensus on procedural values stemming from the public sphere and considers cultures to be part of the private sphere" and proclaims that a state's claimed cultural neutrality "does not exist." This is because "in order to articulate the public sphere, it must unavoidably make decisions that affect symbols, official languages, education and culture in which the nation's homogenous pre-political link is revealed." Liberalism deems it enough to bear in mind, within these decisions, the pluralism of the existing national and cultural groups in a state, without articulating their forms of participation or greater recognition.

In turn, multiculturalism affirms that not even consensus on procedural values of the public sphere is culturally neutral. "The role of the State is not to privatise cultures, but rather to promote and accommodate the cultural diversity that it believes is enriching and inescapable⁴".

Therefore, liberalism recognises the need to protect the cultural contexts in which individuals function only insofar as said protection guarantees said individuals' autonomy and freedom of choice; multiculturalism advocates the protection and promotion of the different cultures which form the identity of the individuals.

It is clear from these points alone that the discussion of collective rights is a debate loaded with presuppositions. The prior implications of each of the positions entail an entire series of very deep theoretical assumptions.

Each of the positions adopted by the authors of scientific doctrine, by the constitutional texts of states and of regional integration movements, by state legislations, and by the public policies accepted by national, territorial or local governments, etc. all stem from a different idea of how to address, understand and tackle the unstoppable phenomenon of cultural pluralism: by assimilating difference or by integrating it.

To include diverse cultural communities and identities within a political entity, whether this is a state entity or a political-administrative one, and to preserve said entity, one can opt for assimilation (which is almost always unsustainable) or for recognising certain rights. These can be those of the individuals of said communities or those of the collectives into which they are integrated, defining the latter by shared cultural traits that are distinct from those of the initial community.

By way of a very brief summary of Pérez de la Fuente⁵ –against the affirmation of collective rights are those who defend the following four theories: 1) The individualist theory which, in ethical, ontological, semantic and methodological terms, states that all intelligence and social interest, and consequentially legal interest, resides in the individual in such a way that only individuals can exercise rights and freedoms. 2) The legal theory which imposes the rigorous observance of the laws which govern all attribution of rights within the legal systems. This collides with the difficulty of determining, with the necessary legal security, who is entitled to collective rights and it also collides with a collective subject's need, in order to exercise rights, to have established mechanisms for representation, decision-making and the assumption of collective responsibility. 3) The redundancy theory, which maintains that collective rights make individual rights redundant, seeing as they respond to the situations which take place in all multicultural societies. 4) The risks theory, which accentuates the disadvantages and damaging or



malign effects resulting from the affirmation of collective rights, compared to the solutions which its adoption provides.

Included in those who favour collective rights are those who adopt one of the following: 1) The social theory, which affirms the necessity to provide protection to the socio-cultural context in which people function, seeing as it is the only framework within which it is possible to fully develop specifically human potentials. 2) The collectivist theory which, beyond the foregoing, believes that there is intrinsic value in collectives, a moral asset which in itself needs to be protected over the individual rights afforded to their members. 3) The political theory, which is based on the need to recognise collective rights due to political and social reasons, so that collectives are called on to correct and improve the justified demands of those to whom individual rights do not apply. 4) The precision theory, which deems that if the measures claimed as collective rights are precisely defined then there is nothing impeding their recognition, seeing as they are outlined as rights based on a group⁶.

Thusly, standpoints of a liberal nature deny the very existence of collective rights. Let us assume that the existence of society is the natural result of man's social dimension, seeing as human beings are only fully realised in the framework of society, and let us admit that individual identity is always necessarily social identity, seeing as human beings exist within a particular social group and are supported by said group (with this supposing, among other things, the sharing of certain cultural traits). Therefore, in order for an individual to develop properly⁷, it is of basic importance to afford them all rights, whether these are cultural or of any other nature, as only that individual can recognise human dignity, the source of the right to one's own cultural identity.

Even when admitting that "the full definition of individual identity always encompasses the reference to the community which defines it,"⁸ one is denying the possibility that the cultural community to which it belongs is personified and therefore recognised as entitled to rights and the subject of protection and guardianship in itself and by itself.

As indicated by Lamo de Espinosa, among others: "At the moment when man is conceived as a 'being of culture', 'zoon politikon', a social animal by nature, respect for the individual cannot cease to encompass respect for the culture which forms him."

This thesis does not consist of affirming that, given the existence of different cultural groups and the belonging of humankind to those groups, there is an inferred duty to

respect those diverse cultures; instead, it maintains that, given that human beings are only fully realised within the framework of a social group and given the insistence on unconditional respect for humans, all humans have an inferred right to the protection of the culture of the social group to which they belong⁹.

According to these authors, there is no "ethical or legal duty to protect traditional cultures other than to the extent and in the way in which said traditions are shared by the members of the social group."

Faced with the difficulties of rigorously attributing collective rights to groups and communities whose members may be unaware of the bodies (which in turn may also be non-existent) through which they can exercise the group's recognised rights, this standpoint believes that the decisive factor is the protection of the individuals who make up this minority. This protection covers their basic rights, including the right to conserve their cultural traits. The standpoint is aware that the attribution of collective rights is not necessary to the provision of adequate protection to social groups, especially minorities, and postulates that: "In short, the protection of a minority is covered by two complementary paths of action: on the one hand, by ensuring equality between the rights of the individuals belonging to the minority and those of the majority group; and on the other, by protecting the difference, i.e. adequately safeguarding the specific cultural idiosyncrasies of the minority group. Well, in both cases we are faced with a problem of protecting individual rights."¹⁰

Unlike this individualist liberal position, the defenders of the communitarianist social standpoint even affirm collective rights as fundamental rights to which certain groups of people are entitled.

Beyond that, a more ambitious position is that manifested in the preamble of the Fribourg Declaration which affirms that "it is essential to guarantee them universally," in such a way that they can be affirmed as universal human rights. By definition, the latter must be recognised for everybody, whether or not they are in a cultural minority, i.e.: said rights must be recognised as universal rights, for every human being, insofar as they are all likely to be found in any of the situations to which they refer.

In the words of Prieto de Pedro, Ibero-American constitutionalism and the Constitutions of Latin America have: "in recent years, made extraordinary progress in the recognition of cultural rights for creative development. Currently, they represent the most important cultural rights

breeding ground or nursery that exists within recent world constitutionalism”. Given the growing sectors of both scientific and legal doctrine and a thriving constitutional jurisprudence coming from the state and regional courts and tribunals which have decisively approved various collective rights, affirming the need to recognise these collective rights and ‘third generation’ human rights, we will now study this concept and its implications.

The expression ‘cultural rights’ designates the right of people within all human communities to a cultural, collective and historic identity and to pursue their own development.

It includes the right of all communities to freely determine their relations with other social and/or political communities, in a spirit of coexistence, dialogue, mutual benefit and respect. They also have the right to determine their own political condition and to freely pursue their economic, social and cultural development.

They can preserve their own institutions, enjoy recognition and have the freedom to preserve and strengthen their own political, legal, economic, social and cultural institutions, whilst also maintaining the right to participate, if they so desire, in the political, economic, social and cultural life of the states and political entities in which they live.

The recognition and exercise of collective rights involves cohabitation within the framework of diversity of nationalities and peoples, respecting and recognising the following aspects of said communities:

Their territoriality:

Participation in the use and administration of the natural resources, such as water, forests, etc., that are found in indigenous territories.

Consultation with indigenous peoples for the exploitation of natural resources such as mines, oil, etc.

The compensation of communities of inhabitants for damages caused to nature by the exploitation of their resources.

Conservation of the ownership of community lands.

Conservation of their cultural identity:

Having bilingual, intercultural education systems.

The right to use one’s mother tongue.

Collective intellectual ownership of their knowledge.

The practice of ancestral and alternative medicine.

The use of one’s traditional clothing and symbols of identity.

The conservation of their sacred places and rituals.

The use of their own forms of organisation:

The conservation and generation of their forms of social organisation and the strengthening of local and community governments.

The exercise of the administration of justice within their communities.

The participation of their representatives in the state bodies in whose territory they are living.

“If freedom was the guiding value of first generation rights, as equality was for economic, social and cultural rights, the main value of reference in third generation rights is solidarity”¹¹.

Therefore, collective rights are part of the so-called third generation rights, the international recognition of which was historically subsequent to that of civil and political rights (first generation) and economic, social and cultural rights (second generation).

Some of the rights of this third generation are rights to sustainable development, peace, artistic and cultural heritage, one’s own cultural identity (especially that of indigenous people), a healthy environment, and consumer rights.

For example, the current Constitution of Ecuador, from 2008, recognises the following as collective rights: environmental rights, those of the indigenous communities who live in the country and those of consumers. Said constitution recognises indigenous peoples’ collective rights to their cultural identity, property, participation, bilingual education and traditional medicine, among others. These rights are extended, as applicable, to black and Afro-Ecuadorian peoples. Said constitution also recognises the entire population’s right to a healthy and ecologically balanced environment, as well as reparations and compensation for consumers affected by harmful products or actions, whether from public or private actors. The Bolivian Constitution (approved by Law 1615 of the 6th of February 1995), the Constitution of the United Mexican States (updated by the reform of the 14th of August 2001), and the Constitution of Paraguay of the 20th of June 1992, etc. all follow the same lines.

As explained by Professor Grijalva¹², third generation rights and therefore collective rights serve to complement those of the two previous generations as regards references to the creation of specific conditions for the exercise thereof. Thus, the third generation right to development creates the conditions for the effective exercise of the second generation

right to work. Similarly, the third generation right to a healthy environment is a necessary condition to exercise first generation rights such as the right to life or to physical integrity.

Without ever affirming their universal nature, said author, along with many others who subscribe to a communitarianist position, distinguish between the collective rights to which all human beings are entitled and which are therefore universal, and those which must be recognised only for certain groups or communities of people, it being more or less possible to determine who may exercise them and who is affected by their violation. Thusly, the third generation rights to development and peace belong to the former, universal category, seeing as they are diffuse rights “the violation of which affects us all, although it is impossible to determine who specifically. In contrast, collective rights tend to refer to more specific groups. The collective rights of indigenous peoples are tailored to those within that category. The collective rights of consumers and to a healthy environment can be diffuse but in terms of it being determinable who is affected by a certain violation thereof, they fit the concept of collective rights better. Of course, the determination of the specific group affected is not always easy or possible.”

Following said author’s reasoning, which is shared by a broad doctrinal current: collective rights are diverse but not contrary to individual human rights. In fact, collective rights include individual rights as regards the corresponding human groups which are entitled to them and in that they create the conditions for the exercise of individual rights. For example, the collective rights of indigenous peoples implicate and protect each person’s individual right to culture. The collective right to a healthy environment covers both the health of the community and that of each of the individuals who form it. However, collective rights are indivisible: they are the rights of the group and of each one of its individual members, but never just one or some of them, with abstraction from the group.

Based on this idea, collective rights complement individual rights even though they may collide with them and, due to the fact that they do not claim a universal character, they can infringe on the principle of equality. This is the case, for example, of the conflict between the right of indigenous communities to maintain their own forms of administering justice, which can sometimes include punishing offenders physically, thus violating said person’s individual right to physical integrity. In cases such as this, numerous authors refute the admissibility of these community practices when

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they are an affront to the individual human rights on which human dignity is founded, meaning that collective rights could never cover such practices.

According to Professor Peces-Barba, “Universality must be the destination point of economic, social and cultural rights and it is closely related to the principle of equality. In other words, it can only be reached if one starts with the basis that inequalities exist and by that virtue those who are not equal should not get treated equally. Special protection should be afforded to those who are worth protecting due to their unique conditions, in such a way that rights become truly universal.¹³⁹”

Along the same lines, Professor Prieto de Pedro affirms: “Cultural rights are and should be seen as rights for all groups and human beings, independently of the different level of realisation that some and others have achieved. If we do not take this conceptual step, it is impossible for us to be able to speak of cultural rights as universal rights and to consider them as a subsystem of fundamental rights (within which we find political, economic, social and cultural rights).

In both cultural rights and fundamental rights, there is a clear double dimension, individual and collective, given

that an individual is not an atom isolated from all others. If that were so, it would wither or be denatured. In contrast, its self is constructed from its interaction with other equal beings. Sociability is a presupposition of human existence, or as the poet Antonio Machado said: 'A solitary heart is not a heart.'

This sociability functions within a range of options in terms of groups. On the one hand are sporadic groups, those which may come together at a football match or in the theatre; then there are secondary stable groups, represented by associations, political parties, neighbours; and lastly there are structural stable groups, legacies of the past, such as nations, municipalities or ethnic and cultural communities.

These realities must be addressed in different ways in terms of cultural rights. It needs to be understood that collective rights do not equate to the sum of the individual rights of the group, as maintained by liberalism, but actually involve much more. These groups are carriers of symbolic universes of the set of their members and they generate identity as the repertoire of shared feeling.

These collective values are constituted by legal assets that must be protected. The guarantees of protecting collective rights are a response to different guarantees which, in some cases, convert the protection of collective rights into something like a compartment made by a town planning department. This process is carried out via the system of personal autonomy (little used) or else that of territorial autonomy (the most common system), giving rise to the different forms of statehood (federal, regional or atypical) which recognise different fields of territorial autonomy. Powers of self-government are exercised autonomously within these fields by certain population groups, defined precisely by said cultural difference.

Furthermore, there is also the institutional guarantee. In this respect, it is illustrative to cite the case of language. When a group has its own language within a wider population, there is an individual dimension in the right that gives individuals the option to choose the way in which they express themselves - their language. Likewise, the collective freedom as regards the use of that language does not equate to the sum of the individual freedoms of all citizens. If the public powers have no action that would institutionalise said group's language as official, it will not be possible to create the collective right.¹⁴

From this standpoint, it therefore becomes necessary to affirm the universality of collective rights and to make progress in the necessary and solid articulation of their individual and collective dimensions. If not, they could come

into conflict when the selfsame system of collective rights does not anticipate how to resolve the prevalence of one case over another.

"One of the defining characteristics of the models of collective rights is that they cannot be reduced to individual rights, situating them in a panorama in which there may be overlaps, contradictions and tensions between the two levels. Therefore, mechanisms must be formulated for the resolution of conflicts between individual rights and collective rights. This is a return back to the consideration of the philosophical debates over whether the individual is predominant or whether the context into which the individual is inserted is predominant. (...)

The theories in favour of collective rights wish to rebuild the relations between collective rights and individual rights so that they are harmonious, but they refrain from presenting them as necessarily conflictive. Indeed, it is believed that collective rights are a precondition for the exercise of individual rights and therefore the former cannot contradict the latter. Individual rights are only effective with the prior existence and effectiveness of collective rights.¹⁵

With this in mind, Escudero Alday summarises this position by affirming: "It is the very protection of individual rights which ultimately necessitates the presence of rights of collective entitlement." He underlines that: "the relationship between rights of individual entitlement and collective entitlement must not be understood in exclusive terms, nor as if they were part of a sort of hierarchical order."¹⁶

As criteria for resolving cases of conflict between individual rights and collective rights, the social theory only considers the legitimacy of the protection of the groups who promote significant autonomous elections, and not those which use internal restrictions to encourage the internal coherence of the group to the detriment of the individual, making use of closed ideologies. As regards the liberal ideology, in a not dissimilar manner, the human dignity of the individual always operates as a limit.

To conclude this chapter, an example of this can be found in the Inter-American Court of Human Rights, specifically the Case of the Kichwa Indigenous People of Sarayaku vs. Ecuador considered that "the right to cultural identity is a fundamental right - and one of a collective nature - of the indigenous communities, which should be respected in a multicultural, pluralistic and democratic society."¹⁷ This means that States are obliged to duly consult the communities settled in their territory about matters which affect or may affect their cultural and social life, in

accordance with their values, traditions, customs and forms of organisation.

Cultural Rights and Human Rights

Having outlined the rights that could be considered as cultural, we shall now address their nature. Can we affirm them as fundamental human rights? Do they constitute authentic subjective rights and should they therefore benefit from the integrity of the guarantees that the legal system (internal and international) provides to ensure their exercise and justiciability, as it does in the case of other human rights?

As Professor Prieto de Pedro repeatedly reiterates, the historic process which gave rise to the recognition of these rights sheds some light on these questions: first to be created were civil and political rights; then came economic and social rights; and the last to be considered worthy of status as human rights were cultural rights.

Their late recognition as fundamental rights and their last place incorporation into the list thereof was not by chance. Even today, cultural rights continue to be an underdeveloped category of human rights¹⁸.

“The dogmatics of fundamental rights in the strict sense and of human rights in the general sense allow us to differentiate, as the United Nations Covenants did paradigmatically in 1966, between: ‘first generation’ rights, especially civil rights and ‘second generation’ rights (economic, social and cultural rights). This is done through the historic-political origin (and ideological roots), the state model (liberal state/social state) and economic/civil society relations. Regarding the rights themselves, the difference is found through their individual/collective nature (entitlement and conditions for exercise), logic structure (negative rights/positive rights) and their object: the negative and positive obligations that define them (state subject to the infringement of rights, state which confers reinstating guardianship of the right, compensating the subjects or another ideal, and the state obliged to provide social satisfaction to those in need, conceived as collectives of individuals). Nonetheless, this differentiation, as based on factors such as historic origin, state model, nature, logic structure and subject/object of negative and positive obligations, is typological and formalist, as is the notion of ‘generations of rights.’ The latter is a source of too many simplifications and therefore its dogmatic use must be employed with due caution and whilst recognising the important nuances that a dogmatic analysis imposes.”¹⁹

In any case, according to Prieto de Pedro: “It is of no surprise that an accomplished author such as Symonides has

titled his recent work ‘Cultural Rights, a Neglected Category of Human Rights,’ or that the Fribourg Group, responsible for creating and presenting a convention on cultural rights to UNESCO would title their work ‘Cultural Rights, an Underdeveloped Category of Human Rights’.”

The Universal Declaration of Human Rights (1948), the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights (1966) affirm that it is impossible to realise the ideal of a free human who is freed from fear and misery. This is unless conditions are created to enable each person to enjoy their civil, cultural, economic, political and social rights.

Similarly, the 1993 Vienna World Conference on Rights and the Declaration and Programme of Action that it approved reaffirmed that all human rights are universal, indivisible and interdependent and related to one another. They also stated that the international community must treat human rights globally, justly and equally, based on equality and giving them all the same weight.

According to the Vienna Convention on the Law of Treaties (Vienna, 1998): “A treaty [the Covenant on Economic, Social and Cultural Rights] shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

Although, according to some, the full effectiveness of the rights recognised in the Covenant is achieved progressively: “The application of some of those rights may be made justiciable immediately, while other rights may be made justiciable with the passage of time.”²⁰

Although it is true that civil and political rights have garnered more consideration by the international community, to the point that ESCRs are often considered as second class rights, as inapplicable and not subject to the courts, given that they can only be made effective “progressively” over a period of time that cannot be determined precisely; this affirmation is erroneous seeing as in some ways ESCRs are more relevant than civil and political rights and are nowadays given preferential consideration.

To quote Resolution 32/130 of the 16th of December 1977, of the General Assembly of the United Nations:

a) All human rights and fundamental freedoms are indivisible and interdependent: equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights;



b) The full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible; “the achievement of lasting progress in the implementation of human rights is dependent on sound and effective national and international policies of economic and social development,” as recognised in the Proclamation of Tehran in 1968.

As affirmed in the 1993 World Conference on Human Rights and in accordance with the Universal Declaration of Human Rights: “The indivisibility and interdependence of civil and political rights and of economic, social and cultural rights are fundamental principles in the international legislation of human rights.”

Therefore, what should be asked is not only whether ESCRs are basic human rights but also to what they give a right to and what is the legal character of the states’ obligations to make them effective.

To summarise, the objective of ESCRs is to ensure the full protection of people, based on said persons being able to

enjoy rights, freedoms and social justice simultaneously.

As Prieto de Pedro explains: “Rights’ mean powers recognised by the legal system and guaranteed by the judiciary and other means of guardianship, in order to satisfy interests that are worth defending and the protection of the state. In the case of cultural rights, we are not addressing common, subjective and always general rights. To the contrary, we are referring to singular and fundamental rights, higher legal powers, especially protected by a system of guarantees that do not benefit from the ordinary subjective rights defined as human rights. Amongst these guarantees we find constitutional guarantees, compared to the reform of texts and in the interpretation of the text of the constitution itself,” which is reserved for the jurisdiction of the Constitutional Court.

Likewise, fundamental rights enjoy a series of exorbitant jurisdictional guarantees of protection which the legal system dispenses for rights which do not have this consideration: they are subject to constitutional protection

– which is supported by summary, privileged and urgent procedures – and they are affirmed as primary values and objectives of the state, which should serve as a guide for the acts of all the public powers. Similarly, the Ombudsman, defined in Spain as the High Commissioner of the Parliament, responsible for defending the fundamental rights and civil liberties of citizens by monitoring the activity of the Administration and public authorities, constitutes another guarantee that only operates in relation to these rights and their possible infringement by the public powers.

Any citizen can turn to an Ombudsman and request their intervention, free of charge, in the investigation of any, presumably irregular, action of the public administration or its agents. They can also officially intervene in cases of which they are made aware, even if no complaint has been made.

A bit of history

As seen in the foregoing, the historic context which gave rise to the gradual recognition in international spheres of the successive generations of rights explains the motives which lead to their proclamation, conception and subsequent development: the approval of the Universal Declaration of Human Rights. This took place in 1948 after the Second World War and the creation of the United Nations as a result of the international community's commitment to never allowing more atrocities such those which occurred in said conflict.

Faced with the terrible fundamental human rights violations which took place in the two world wars, there was an affirmation that said rights should be the object of international protection. In very little time, the international community understood that, in order to achieve the full effectiveness of civil and political rights, it was necessary to guarantee citizens a life of dignity, via the recognition and promotion of economic, social and cultural rights.

However, two categories of rights were outlined and since then they have remained as two independent categories, with civil and political rights keeping their place of privilege as if their respect and effectiveness came about as an inevitable consequence of the efficiency of the others.

Similarly, the legal construction on which both categories of rights were built rests on different foundations. Civil and political rights implied the state's duty to abstain and were of immediate application, whilst economic, social and cultural rights implied the state's active participation and were designed for progressive application.

It seems clear that that initial difference, explicable in a liberal context which advocated the least amount of state

intervention in public matters, was no longer defensible, since the effectiveness of both categories of rights required the adoption of positive measures – either laws or active policies – which did not impede and, what's more, made possible the free exercise of rights.

On the other hand, the affirmation of ESCRs as rights that are not complete in themselves, nor constitutive of authentic powers that may help citizens immediately, but rather as programmatic, non-subjective rights which must inspire the public powers to take action in their legal activity and in the adoption of public policies, greatly weakens their effectiveness, although not their status as fundamental rights. Nonetheless, nor does it seem acceptable to follow the theory that maintains that while freedoms are made fully legal in the constitution, i.e. formulated and protected as immediately applicable rights, social rights (among which are cultural and economic rights) can only be included “programmatically, but they do not acquire a positive legal nature until they are developed through legislation, seeing as compared constitutional law offers numerous examples of social rights whose effectiveness does not require [for their immediate enforceability] legislative integration. In Italy for example, the right to equal pay has not been generally considered by jurisprudence as immediately founded on Article 36 of the Constitution, insofar as the rights of freedom also very often require the intervention of a legislator to be directly enforceable and, consequentially, to have full guarantee.²¹”

In any case, the inclusion of ESCRs in constitutional texts has not lead to the establishment of effective legal mechanisms for their material realisation.

“The State of Law supposes the limitation of the state's power by the law itself, the control of the state powers, the protection and defence of fundamental rights and freedoms, all of which is oriented at the protection of individuals from the arbitrariness of the administration.”

Liberal states consecrated a principle of equality, this being understood as the legal, merely formal equality of citizens in the eyes of the law. This concept was refuted by social states when they legally consecrated equality, not only in terms of legality but also in its material aspect. Furthermore, the affirmation of a social and democratic state involves “the public powers assuming responsibility for providing the general public with the provisions and public services needed to defray their vital necessities, i.e. they cover that which German doctrine has qualified as a universal cure (*Daseinsvorsorge*)²².

Following the reflection of Professor Gregorio Peces-Barba, ESCRs are “fundamental rights due to the ultimate finality they are given and not for the way in which they are deployed in reality.”²³

Regarding the foregoing and in terms of the differing guardianship recognised for civil and political rights, on the one hand, and economic, social and cultural rights, on the other: it has been maintained that “while the rights of freedom directly benefit from constitutional guardianship, social rights cannot be the immediate object of such guardianship.”²⁴ This affirmation, as we have seen previously, is not necessarily true or inevitable as there is still the jurisdictional body that is responsible for guaranteeing fundamental rights, considering that their formulation in the text of the constitution is sufficient founding for their legal guardianship and to justify the declaration that all provisions that ignore or infringe them are unconstitutional.

Furthermore, cultural rights, as delimited by the adjective ‘cultural,’ conflict, first of all, with the diverse notions of what culture is, thus conditioning their scope: therefore one notion is restricted to minorities and the other implies that they are rights that affect all citizens. This is a distinction of enormous transcendence, since “the nature of universality is put forward as a deontological condition of human rights but not of fundamental rights.”²⁵

Following the explanation by Prieto de Pedro: “The first legal provisions in international spheres came from the 1966 International Covenant on Economic, Social and Cultural Rights, which featured them in their broad and open sense. However, the immediate development those rights have undergone has limited them to minority groups which claim a situation of weakness compared to the majority group. This is one of the great errors we are facing at this time. It is a dead-end resulting from having accepted a proposal which defines cultural rights as a concession to minorities over the majorities, when cultural rights form part of the heritage of all mankind.

For this reason, I propose an understanding of cultural rights as rights which guarantee the free, equal and fraternal development of human beings in that singular capacity we have to be able to symbolise and create meanings of life that we can communicate to others.”²⁶

With regard to the historic process of the recognition and legislation of human rights, the same author refers to how “the evolution of the formulation of human rights was characterised by an uninterrupted chain of construction of rights. From the constitutions of the beginning of the 19th

century until today, three generations of fundamental rights have been recognised: the first generation, formed of the fundamental rights of freedom; the second, with the rights of equality; and the third containing the fundamental rights of solidarity. All of which are related to the central theme of the French revolution: ‘liberté, égalité et fraternité’.”

The fundamental rights of freedom are linked with the autonomy of the individual. Liberty signifies autonomy because it creates areas of resistance into which the public powers cannot enter. The individual is afforded a sphere of immunity in which to exercise their freedom without interference from the powers that be. This occurs in the case of the freedoms of expression, association, conscience and religion.

The second generation of rights are economic, social and cultural rights. Unlike the previous ones, these do not involve the public powers remaining on the margins and respecting the circle of power which the right grants to the individual. Indeed, precisely the opposite occurs: powers must commit to the development of the equality of individuals by offering services and benefits. These include the rights to education, health and culture, which take their shape from the provision of cultural services and the institutionalisation of culture.”

Professor Prieto also refers to how Eleanor Roosevelt, who presided the United Nations Commission of Human Rights during the creation of the Universal Declaration of Human Rights, brilliantly expressed the close link that makes civil and political rights and ESCRs interdependent, when she affirmed: “Necessitous men are not free men.”

The third generation saw the appearance of the rights of solidarity which protect diffuse interests such as the environment, consumer rights, the right to peace and also group rights which include the right to an identity.

“Despite the fact that only the second category refers explicitly to cultural rights, this classification makes their complexity clear, seeing as they contain elements of each of the category. For example, in the first we include the freedom of cultural creation, artistic freedom, scientific freedom, cultural communication, the freedom to communicate the expressions created in culture, etcetera. The so-called right of access to culture is a typical second generation right because to access culture one needs provisions related to large public services (museums, archives and libraries, which are instruments for the realisation of the right to the provision of access to culture). Similarly, the third generation presents, in the form of the right to cultural heritage, the

right to the conservation of cultural memory and the rights to develop the identity of an ethnic group and of different cultural groups.²⁷

Similarly and as we have seen previously, cultural rights often find approval as a necessary dimension for a full and effective protection of civil and political rights.

In turn, the International Commission of Jurists²⁸ (icj.org) has constantly recognised that “ESCRs must be considered with the same gravity as that with which civil and political rights are treated. ESCRs have formed part of the language of international human rights at least since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. However, compared to civil and political rights, considerably less attention has been paid to the need to develop the contents of ESCRs and they have been given less protection mechanisms to make them effective.”

In its second report on Courts and Legal Enforcement of Economic, Social and Cultural Rights, the Commission affirms that: “These gaps in the international human rights system came about for political and not for legal reasons.

To a great extent, the cause of these gaps was the prominence accorded by Western countries to civil and political rights, in the context of the cold war divide. As a consequence, the notion of the justiciability of ESC rights has been neglected and largely ignored. The term ‘justiciability’ means that people who claim to be victims of violations of these rights are able to file a complaint before an independent and impartial body, to request adequate remedies if a violation has been found to have occurred or to be likely to occur, and to have any remedy enforced.²⁹”

If civil and political rights and ESCRs wish to be considered on equal footing, it is crucial to close the breach between the justiciability of the two types. With this purpose, the cited study illustrates with numerous examples that ESCRs are susceptible to legal protection, as demonstrated to varying degrees by the practice of many courts throughout the world.

Notes

(1) ARROYO YANES, L. M. (2006). «Cultural Rights as Developing Rights - An Approximation. New public policies: A multidisciplinary annual for the modernisation of public administrations». *Social Rights*. n° 2, pp. 262-283.

(2) A binding international convention which is open for ratification and specifically addresses the rights of indigenous and tribal peoples. To date, it has been ratified by 20 countries. Once a country ratifies the convention, it has one year to align its legislation, policies and programmes before

said convention becomes legally binding and immediately applicable. Having ratified the convention, said countries are subject to supervision regarding its implementation.

(3) PÉREZ DE LA FUENTE, Ó. (2005). *Cultural Pluralism and the Rights of Minorities*. In the collection: *Human Rights and the Philosophy of Law*, Madrid, Bartolomé de las Casas Institute of Human Rights-Carlos III University of Madrid-Ed. Dykinson, Madrid.

(4) PÉREZ DE LA FUENTE, Ó. Ob. cit. pp. 87-88.

(5) PÉREZ DE LA FUENTE, Ó. Ob. cit.

(6) Along these lines, Kymlicka distinguished between “rights of self-governance, poly-ethnic rights and special rights of representation.” W. KYMLICKA (1996). *Multicultural Citizenship*, Paidós Iberia, p. 61.

(7) DE LUCAS, J. (1994). *The Challenge of Borders. Humana Rights and Xenophobia in a Plural Society*, Madrid, Temas de Hoy, p. 66.

(8) TAYLOR, Ch. (1989). *Sources of the Self*, Cambridge University Press.

(9) MARTÍNEZ PUJALTE, A. L. (1998). “Human Rights and Cultural Identity: A Possible Conciliation between Interculturality and Universality. Person and Right”. *Magazine on the Foundations of Legal Institutions and Human Rights*, n° 38.

(10) MARTÍNEZ PUJALTE, A. L. Ob. cit.

(11) PÉREZ LUÑO, A. E. (2006). *The Third Generation of Human Rights*. The Global Law Collection, Ed. Aranzadi.

(12) GRIJALVA, A. (2009). *What are Collective Rights? Administration of Indigeneous Justice and Collective Rights*, Ecuador, Universidad Andina Simón Bolívar.

(13) PECES-BARBA, G. (1999). *Economic, Social and Cultural Rights: Notes on their historic formation and their concept*. Economic, Social and Cultural Rights and their Legalisation, Madrid: Editorial Dykinson, 1999.

(14) PRIETO DE PEDRO, J. (2004) *Cultural Rights and Human Development*. Ibero-American Thinking. Cultural magazine, Organisation of Ibero-American States for Education, Science and Culture, OEI, n° 7.

(15) PÉREZ DE LA FUENTE, Ó. Ob. cit., p. 450.

(16) ESCUDERO ALDAY, R. (2001). “Collective Rights in the Face of Madness and Barbarism” en F. J. Ansuátegui Roig (ed.), *A Discussion about Collective Rights*, Madrid, Dykinson, p. 73.

(17) IACHR Case of the Kichwa Indigenous People of Sarayaku vs. Ecuador, Merits and Reparations, Judgement of 27th of June 2012, Series C, n° 245, Para. 217.

- (18) PRIETO DE PEDRO, J. Ob. cit.
- (19) BASTIDA FREIJIDO, F. et al. (2004). General Theory of the Fundamental Rights in the Spanish Constitution of 1948, Madrid, Tecnos, pp. 83-119. ALSO CARBONELL, M. (2002). The Constitution in Earnest, Multiculturalism, Equality and Social Rights, Mexico, Porrúa unam –ijj. ABRAMOVICH, V. and COURTIS, Ch. (2004). Social Rights as Demandable Rights, L. Ferrajoli (prologue), Madrid, Trotta, especially chapters 1 and 2, pp. 19-116. All cited by Zúñiga Urbina, F.
- (20) LLANOS MANSILLA, H. (2010). “Economic, Social and Cultural Rights, ESCRs”. *Ars Boni et Aequi*, vol. 6, n° 1, pp. 149-198.
- (21) PEREZ LUÑO, A. E. Ob. cit., p. 307ff.
- (22) From PÉREZ LUÑO, A. E. Ob. cit., p. 193.
- (23) PECES-BARBA, G. Ob. cit., p. 64.
- (24) RIVERO, J. (1973). Public Freedoms. Collection: The Rights of Man, Paris, Presses Universitaires de France.
- (25) BOROWSKI, M. (2003). The Structure of Fundamental Rights. Series: Legal and Philosophical Theory on Law. Spanish translation by Carlos Bernal Pulido, Universidad Externado de Colombia, p. 145.
- (26) PRIETO DE PEDRO, J. Ob. cit.
- (27) PRIETO DE PEDRO, J. Ob. cit.
- (28) The International Commission of Jurists (ICJ) is a non-governmental organisation dedicated to the promotion of knowledge and respect of the State of Law and the legal protection of human rights throughout the world. Its headquarters are in Geneva and it has 37 national branches, 45 affiliated organisations and 60 eminent jurists in all regions of the world.
- (29) Courts and Legal Enforcement of Economic, Social and Cultural Rights, the Commission. Comparative experiences of justiciability. Series: Human Rights and the State of Law, n° 2.